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No. 82-25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT A. JONES, ET AL.,
Petitioners,

v.

RICHARD S. SCHWEIKER,
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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December 16, 1982.

QUESTION PRESENTED

Whether the Fourth Circuit erred in construing §216(h)(2)(A) of the Social Security Act to exclude consideration of the Constitution when §216(h)(2)(A) directs the Secretary to apply "such law as would be applied in determining the devolution of intestate property" by the state courts and where the state courts would, under the Supremacy Clause, apply the Constitution to determine whether an illegitimate child is entitled to inherit by intestate succession in that state.

PARTIES

The Petitioners before the Court are Albert A. Jones; a minor child, by his mother and next friend Albertine Jones; Bridget Jones; Barbara Jones and

Marcia Simms, a minor child, by her mother and next friend Sheila Simms. The Respondent is Richard S. Schweiker, Secretary, Department of Health and Human Services.

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OPINIONS BELOW

The opinions of the United States District Court for the District of Maryland, both dated November 20, 1981, are not reported [Pet. App. B, pp. 54, Pet. App. D., p. 69a]. The decision of the United States Court of Appeals for the Fourth Circuit is reported at 668 F.2d 775 (4th Cir. 1981) [Pet. App. A, p. 1a].

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1981. [Pet. App. A, p. 2a]. Petitioners' Petition for Rehearing was denied on April 5, 1982. [Pet. App. J, p. 136a]. The Petition for a Writ of Certiorari was

filed on July 2, 1982, within 90 days of the denial of rehearing pursuant to Rule 20.4 of the Rules of the Supreme Court of the United States and 28 U.S.C. §2101(c).

STATUTES

Section 216(h)(2)(A) of the Social Security Act, 42 U.S.C. §416(h)(2)(A), provides:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the

courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

STATEMENT OF THE CASES

The Social Security Act, 42 U.S.C. §402(d)(1), provides for the payment of monthly benefits to children whose parents are deceased. While there are a number of eligibility conditions for child's benefits, only one is at issue in this case.[1/] The Act, 42 U.S.C. §402(d)(1)(C)(ii), provides these benefits only to children who were "dependent" on the wage earner at the time of

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1/ The other eligibility conditions are that the child must be below a certain age, be unmarried, and have filed an application. 42 U.S.C. §402(d)(1). Also, the deceased parent must have been "insured" under the Social Security Act at the time of his death. Id. None of these eligibility conditions are disputed in this case.

his death. "Dependent", however, is a term of art, and all legitimate children as well as several categories of illegitimate children are "deemed" dependent and are not required to establish that their deceased parent contributed to their support in any fashion. Mathews v. Lucas, 427 U.S. 495, 497-499 (1976).

Petitioners, Marcia Simms and the Jones children base their claim on one of these categories, contained in §216(h)(2)(A) of the Social Security Act, 42 U.S.C. §416(h)(2)(A). This section provides benefits to illegitimate children who have the same status as a child who is entitled to inherit under the law that would be applied by the appropriate state court. Illegitimate children who fit within this category are automatically entitled to child's benefits without any showing of actual

dependency. Mathews v. Lucas, 427 U.S. at 514, n.17.

Marcia Simms's claim for child's benefits began on August 26, 1977 when her mother, Sheila Simms, filed an application on her behalf. Marcia Simms was born on March 5, 1972 and is now ten years old. [Pet. App. G, p. 117a]. Her father, Talmadge Meadows, died in Baltimore, Maryland on August 31, 1971. [Pet. App. G, p. 117a]. At that time, Mr. Meadows was domiciled in West Virginia but was in the United States Army and was stationed at Ft. Holabird, in Maryland. [Pet. App. G, p. 128a].

Mr. Meadows and Ms. Simms began dating in Baltimore in November, 1970 and in June, 1971, Ms. Simms became pregnant. [Pet. App. G, pp. 116a-117a]. Ms. Simms advised Mr. Meadows of her pregnancy, and they began making plans

to be married following Mr. Meadows' expected discharge from the Army in August, 1971. [Pet. App. G, p. 117a]. On August 11, 1971, Mr. Meadows was shot and killed in a non-military incident. [Pet. App. D, p. 72a]. At the time of his death, Ms. Simms was six to eight weeks pregnant, and on March 5, 1972, she gave birth to Marcia. [Pet. App. G, p. 117a].

The Simms's application for Social Security benefits was denied throughout the administrative process. The Administrative Law Judge who heard the administrative appeal found that Talmadge Meadows "was the biological father of the child [Marcia]." [Pet. App. G, p. 118a]. The Administrative Law Judge concluded, however, that Marcia was not entitled to benefits, in part, because the intestate succession "law of West

Virginia provides that an illegitimate child may inherit intestate from his father only if the parents intermarry." [Pet. App. G, p. 121a]. Since there was no intermarriage, Marcia did not meet this requirement. [Pet. App. G, p. 121a].

The Jones case began on August 26, 1976 when Albertine Jones filed an application for Social Security child's benefits on behalf of her three minor children. This application was based on the Social Security earnings record of Odes Watson. [Pet. App. F, p. 84a]. Ms. Jones and Mr. Watson knew each other for many years while they both lived in Mississippi. [Pet. App. F, pp. 91a-92a]. They were not married but had three children, Barbara, Bridget and Albert Jones, who were born on July 6,

1959, March 18, 1961 and November 22, 1966, respectively. [Pet. App. F, pp. 84a and 100a].

In 1972, Mr. Watson suffered a head injury while working. [Pet. App. F, p. 100]. He never recovered from this injury. [Pet. App. F, p. 101a]. Ms. Jones left Mississippi with her children about a year after the injury and moved to Baltimore, Maryland, where she still resides. [Pet. App. F, p. 91a]. She returned to Mississippi twice in 1974 and visited Mr. Watson each time. [Pet. App. F, p. 93a]. Mr. Watson died on April 22, 1975 while domiciled in Mississippi. [Pet. App. F, p. 85a].

The Jones application for Social Security benefits was denied throughout the administrative process. The Administrative Law Judge found that Odes Watson was "the biological father of the

children" but denied their claim, in part, because they were "not eligible to inherit the personal property of the wage earner through intestate succession under the laws of Mississippi." [Pet. App. F, p. 99a, 100a].

After exhausting their administrative remedies, Ms. Jones and Ms. Simms, on behalf of their children, each filed actions for judicial review, pursuant to 42 U.S.C. §405(g), in the United States District Court for the District of Maryland. On November 20, 1980, the Honorable Joseph H. Young entered a Memorandum and Order in each case granting Defendant Secretary's Motion for Summary Judgment. [Pet. App. B, p. 54a, Pet. App. D, p. 69a]. Final judgment was entered in favor of the Secretary on November 24, 1980. [Pet. App. H, p. 132a, Pet. App. I, p. 134a].

Ms. Simms and Ms. Jones each timely filed an appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals thereinafter consolidated the two cases for the purpose of the appeal. [Pet. App. A, p. 1a].

In both the District Court and the Court of Appeals, the Jones children and Marcia Simms argued that they were entitled to Social Security benefits under §216(h)(2)(A) of the Social Security Act, 42 U.S.C. §416(h)(2)(A).[2/] This section of the Act provides that illegitimate children are entitled to Social Security benefits, without any showing of parental support, if they have the

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2/ They also argued that the evidence established that their fathers had contributed to their support within the meaning of 42 U.S.C. §416(h)(3)(C)(ii). This claim was rejected by the lower courts and is not renewed here.

status of a child who is entitled to inherit their father's personal property according to "such law as would be applied . . ." by the applicable state court. Simms and Jones argued that the state intestate succession statutes of West Virginia and Mississippi both unconstitutionally discriminated against illegitimate children. As a result, if their cases were pending in state courts, the state courts would have no alternative but to declare their statutes unconstitutional and permit these children to inherit on the same basis as legitimate children.[3/]

Prior to oral argument, the court notified the Attorneys General of Mis-

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3/ West Virginia's Supreme Court of Appeals did declare that state's intestate statute invalid. Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981). This case is discussed infra at 84-87.

sissippi and West Virginia that the constitutionality of their state statutes had been called into question and invited them to participate in the appeal, pursuant to 28 U.S.C. §2403(b). [Order, United States Court of Appeals for the Fourth Circuit, April 21, 1981]. Neither West Virginia nor Mississippi opted to participate in the case.

On June 2, 1981, the Court of Appeals, by a 2-1 majority, affirmed the decisions of the District Court and thereby upheld the denial of Social Security benefits to Petitioners. [Pet. App. A, p. 1a].

The basis of the Court of Appeals decision was that "such law as would be applied," as used in §216(h)(2)(A), did not include the United States Constitution. The court therefore did not determine whether the intestate statutes

were unconstitutional but held that, even if illegitimate children "would qualify as takers in intestacy" because of the constitutionally invalid intestate statutes, they would not be entitled to Social Security benefits. [Pet. App. A, pp. 28a-29a].

The underlying premise of the Fourth Circuit's conclusion was that Congress intended to incorporate only state statutory law because state legislative enactments reflected the popular conception within the jurisdiction as to which children were probably dependent on the wage earner. Application of the Constitution, according to the court, would frustrate the congressional scheme because it would entail a result unintended by the state legislatures. [Pet. App. A, pp. 27a-28a]. The court thus rejected the contention that Congress

intended the Secretary, in determining the status of a child for Social Security purposes, to apply the whole law a state court would apply, including the Constitution, in determining which children could inherit their father's intestate property.

SUMMARY OF THE ARGUMENT

Section 216(h)(2)(A) of the Social Security Act directs the Secretary to grant Social Security child's benefits to illegitimate children if they would have the status of a child who is entitled to inherit under "such law as would be applied" by the applicable state court. The Fourth Circuit concluded that "such law as would be applied" by a state court, as used in §216(h)(2)(A), includes only state statutory law and does not include the Constitution.

Petitioners contend that "such law as would be applied" encompasses the whole law of the state, which, of course, includes the United States Constitution. This is a critical difference because Marcia Simms and the Jones children did not meet the requirements of the state statutory law which was in effect at the time their claims were adjudicated. Nonetheless, they would plainly have the status of a child who can inherit under the whole law of the state because a state court, under the Supremacy Clause, would apply the Constitution and find its intestate succession statutes invalid under the Fourteenth Amendment.

Simms and Jones assert that Congress did not intend the Secretary's inquiry to be limited to reviewing the state statute. The language of the

Social Security Act indicates this intention since "such law as would be applied" was used without limitation and would naturally include all the law a state court would apply. Under the plain language of the statute, the Secretary and the federal courts would apply whatever law a state court would apply in similar circumstances, be it statutory, common, or constitutional law.

This plain language is supported by the Secretary's longstanding practice, embodied in the Secretary's Social Security Rulings, of applying the whole law of the state in determining family status under the Act. These Rulings require the Social Security Administration to apply decisional law, conflict of law principles, common law, foreign law and constitutional law in determining

whether an individual meets the definition of child, widow, widower, wife or husband under the Act. These Rulings are entitled to substantial deference in interpreting the statute and offer a significant reason for relying on the plain language of the statute.

In addition to the administrative practice, consistent judicial interpretation of the Act, covering a 30 year period, indicates that Congress intended the application of the whole law of the state and did not intend the Secretary to rely solely on state statutes. This longstanding practice underscores the correctness of the Secretary's administrative interpretation.

Moreover, the legislative history and purpose, although sparse, indicates that Congress intended to provide Social Security benefits to any child who had

the status of a child who could inherit in state court. This purpose is achieved by requiring the Secretary to apply whatever law a state court would apply in a probate case, which, of course, includes the Constitution.

Finally, the Fourth Circuit's construction of the Act would lead to absurd results, requiring the Secretary to apply, in a federal proceeding, a state statute which the state's highest court has invalidated on the basis of the federal Constitution. Because Congress could not have intended this absurd result, the Court should construe the statute so that this result can be avoided.

When the plain language is applied, reinforced by the longstanding, consistent administrative and judicial practice, as well as the legislative pur-

pose, it is clear that Congress intended the Secretary to consider the Constitution in adjudicating Social Security claims. Accordingly, the decision of the Fourth Circuit should be reversed.

In the alternative, the decision of the Fourth Circuit should be vacated and the cases remanded to the Secretary for further proceedings in light of a decision by the West Virginia Supreme Court of Appeals and an amendment to the Mississippi intestacy statute. Neither this decision nor this amendment was considered by the Secretary or the lower courts and the Secretary may have reached a different decision under these authorities.

ARGUMENT

A. THE DECISION OF THE FOURTH CIRCUIT SHOULD BE REVERSED.

I. The Plain Language Of The Statute Requires The Secretary To Apply The Constitution.

As in any case involving statutory interpretation, the Court's inquiry here must begin with "the language of the statute itself." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). If the Court finds the statutory language to be clear and unambiguous, the "judicial inquiry is complete, except in 'rare and exceptional circumstance.'" Rubin v. United States, 449 U.S. 424 (1981) (quoting Crooks v. Harrelson, 282 U.S. 55 (1930)).

In this case, Congress provided benefits to all illegitimate children

who have the status of a child for inheritance purposes. In making this determination, Congress, in §216(h)(2)(A), directed the Secretary to:

> apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the wage earner] . . . was domiciled at the time of his death . . .

42 U.S.C. §416(h)(2)(A).

Analysis of this statutory language raises two basic questions. First, is the United States Constitution part of the law that would be applied by the courts of West Virginia and Mississippi in determining the devolution of the intestate property of Odes Watson and Talmadge Meadows? If the answer to this question is affirmative, the question then becomes whether Congress nonetheless intended to exclude consideration of the Constitution in determining who is a "child."

(a) The Constitution Is Part Of The Law State Courts Would Apply In Determining The Devolution Of Intestate Property.

The section of the Social Security Act involved in this case basically looks to the state courts for the substantive law to determine who is the wage earner's "child." Under the Supremacy Clause, however, a state court would have to take into account the Constitution in determining whether an illegitimate child could inherit by intestate succession. Judge Bryan, in his dissent in Jones, explained this point:

> Thus a State court, construing its intestate succession statute, must consider whether its law violated the Equal Protection Clause of the Fourteenth Amendment and if it finds its law to be repugnant to the Constitution, then it may not let it remain as an obstacle to the children's in-

> heritance. In short, if the State court must determine that its law is unconstitutional, it must permit the illegitimate children to inherit in the same way as legitimate children.

(Pet.App. A, p. 39a)

The state courts of West Virginia and Mississippi would, as Judge Bryan concluded, undoubtedly apply the Constitution. West Virginia's highest court has, in fact, already done so. In Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981), the West Virginia Supreme Court of Appeals held that West Virginia's intestate succession statute denied illegitimate children the equal protection of the laws under both the United States Constitution and the West Virginia Constitution.[4/] Because the

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4/ Adkins was decided on July 13, 1981, after Jones was fully briefed and argued but prior to the Fourth Circuit's decision. Because Adkins was not immediately published, counsel was unaware of Adkins while

statute was constitutionally defective, the court extended the ability to inherit to illegitimate children until such time as the legislature passed a constitutionally valid statute. Under this decision, illegitimate children have the same right to inherit as legitimate children in West Virginia.

Adkins supplies conclusive proof, if any were needed, that the Constitution is part of the law the West Virginia courts would apply in determining which children can inherit intestate property in West Virginia. Adkins, of course, is not alone, and many state courts have reached the same conclusion. See e.g., Nagle v. Wood, 178 Conn. 180, 423 A.2d 875 (1979); In Re Estate of

(n. 4 cont'd)

Jones was pending at the Fourth Circuit, and the court thus did not consider Adkins in reaching its decision in Jones.

Burris, 361 So.2d 152 (Fla. 1978); Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135 (1980); Estate of Browning, 5 Pa.D&C 3d 772 (1977); and Allen v. Harvey, 568 S.W.2d 829 (Tenn. 1978).

Thus, there hardly can be any question but that West Virginia and Mississippi would, under the Supremacy Clause, apply the Constitution in determining which illegitimate children are entitled to share in the devolution of intestate property in those states.

(b) The Statutory Language Does Not Demonstrate An Intent To Exclude Consideration Of The Constitution.

The language chosen by Congress does not indicate that Congress intended to exclude consideration of the Constitution. The statutory language is clear and unequivocal. The Secretary and the

federal courts are to "apply such law as would be applied" by the state courts in determining which children have inheritance rights. This directive contains no modifiers and on its face would require the application of whatever law the state court would apply, be it statutory, constitutional, or common law. Cf. Richards v. United States, 369 U.S. 1 (1962) ("law of the place" under Tort Claims Act includes the whole law including a state's choice of law rules); United States v. Hvass, 355 U.S. 570 (1958) ("law of the United States" includes a district court rule); and U.S. v. Howard, 352 U.S. 212 (1957) ("law of a State" includes state regulations).

Congress could have, but did not, specifically limit benefits to children who met the requirements of "the intes-

tate statute" of the appropriate state. If Congress intended to incorporate only state statutes, it is hard to see why the far more cumbersome directive to apply "such law as would be applied in determining the devolution of intestate personal property by the [state] courts" would have been used. Courts obviously apply much more than statutes and would in all cases be expected to apply the nation's supreme law, the United States Constitution.

Exclusion of the Constitution would be peculiar at best. The Constitution is, after all, the nation's preeminent law. All courts, state and federal, are bound by its terms, and it takes precedence over all statutes, state and federal.[5/] Congress surely is aware of

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5/ This principle is so basic that the Court needed no explanation when it stated, in a diversity case, "Federal constitutional

this principle. Thus, when Congress directed the Secretary to apply "such law as would be applied" by a state court, there is no reason to believe that Congress meant to exclude consideration of the Constitution.

This is not a novel or unique theory. The Court has already suggested that the Constitution is applicable in these circumstances. In Mathews v. Lucas, 427 U.S. 495 (1976), the Court upheld the constitutionality of the Act and noted that §216(h)(2)(A) was generally reasonable. The Court noted, however, that, if a state intestate statute

(n. 5 cont'd)

> questions we must consider, because a federal court would not give effect, in either a diversity or nondiversity case, to a state statute that violates the Constitution of the United States." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547 (1949). See also, First National Bank of Chicago v. United Air Lines, 342 U.S. 396 (1952).

were constitutionally invalid, the child would be entitled to benefits under that section:

> Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited, see, Labine v. Vincent, 401 U.S. 532 (1971), in which case appellees would be made eligible for benefits under §216(h)(2)(A).

427 U.S. at 515, n. 18. [Emphasis supplied]. The implication of this dicta is that a child would be "made eligible . . . under §216(h)(2)(A)" because the child would have the same status as a child who could inherit under the law a state court would apply.

This is the precise result recently reached by the Fifth Circuit in Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982). The issue in Cox was whether an illegi-

timate child was the "child" of the deceased wage earner within the meaning of §216(h)(2)(A). In deciding this issue, the court analyzed the intestate succession statutes of Georgia, where the wage earner was domiciled at his death, in light of the United States Constitution. The reason this was appropriate, according to the court, was that the "state courts of Georgia, no less than the courts of any other state, and of course no less than the federal courts, must adhere to the same fundamental constitutional principles by virtue of the Supremacy Clause of the federal constitution." Id. at 317.

The same result has been reached by the Eighth Circuit and at least four district courts. See Gross v. Harris, 664 F.2d 667 (8th Cir. 1981); Robin C. v. Schweker, 532 F.Supp. 677 (D.N.H.

1982); White v. Harris, 504 F.Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980); and Allen v. Califano, 456 F.Supp. 168 (D.Md. 1978).

The only reasonable conclusion from the language of the statute is that Congress intended the Secretary, in deciding whether an illegitimate child is entitled to inherit and thus receive Social Security benefits, to apply the same law, be it constitutional, statutory, or common law, that a state court would apply.

Because the statutory language is clear, the Court need look no further to determine congressional intent. See, Ernst and Ernst v. Hochfelder, 425 U.S. 185 (1976), and U.S. v. Oregon, 366 U.S. 643 (1961). Nonetheless, Petitioners will demonstrate that there exist per-

suasive indications that the Act was intended to be applied in accordance with the plain statutory language.

II. The Longstanding Practice Of Both The Secretary And The Federal Courts Demonstrates That The Act Is To Be Applied In Accordance With The Plain Language.

In concluding that §216(h)(2)(A) includes only state legislative enactments, the Fourth Circuit rejected the contention that "such law" encompasses the whole law of the state, including the Constitution. As explained above, this conclusion is contrary to the plain words of the statute.

In addition, however this conclusion is contrary to the longstanding practice of both the Secretary and the federal courts. For many years, the Secretary and the federal courts have consistently viewed their role as basic-

ally sitting as a state court and applying all the law a state court would apply, including statutes, court decisions, common law, foreign law, state constitutions and the United States Constitution. Neither the Secretary nor the courts have ever viewed their role as simply applying state statutes. These administrative and judicial interpretations of the Act offer considerable support for the conclusion that the Constitution is applicable in the adjudication of Social Security child's insurance claims.

(a) The Secretary's Practice

It is well-established that "The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in

construing the statute." Youakim v. Miller, 425 U.S. 231, 235 (1976). Indeed, such interpretations and opinions by the agency administering the Act "should be followed unless there are compelling indications that [they are] wrong." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969).

In the context of Social Security benefits, the Secretary interprets the statute, in part, through Social Security Rulings (hereinafter "SSR"). These Rulings, which are published and made available to the public, consist of "final opinions and orders and statements of policy and interpretations that have been adopted by the Administration." 20 C.F.R. §422.408. Social Security Rulings are generally based on administrative and judicial decisions, opinions of the Office of General Coun-

sel, decisions of the Commissioner of Social Security, formal agency policy statements, and other interpretations of the statutes and regulations. See Preface to April, 1982 Social Security Rulings. While these Rulings do not have the full force and effect of law, they are "to be relied upon as precedents in determining other cases where the facts are basically the same," and "Once published they are binding on all components of the Social Security Administration." Id.; see also, 20 C.F.R. §422.408.

Social Security Rulings thus embody the Secretary's interpretation of the Act and demonstrate how the Act is to be administered. As such, these Rulings are entitled to substantial deference in interpreting the Act.

The Secretary's Rulings which are relevant to this case demonstrate with-

out doubt that the whole law of a state, including the United States Constitution, is to be considered in determining family status under the Social Security Act.

In 1967, the Secretary issued SSR 67-56, in a case which is strikingly similar to the present case. At that time, South Carolina had an antimiscegenation statute which no court had apparently declared invalid. Yet the South Carolina statute was obviously unconstitutional under the then recent case of Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967). The question for decision in the Ruling was whether an Indian woman, married to a white man in violation of South Carolina's antimiscegenation statute, could be recognized as his wife for the purpose of Social Security benefits. In order to

be eligible, the wife had to establish that the state courts would find that the marriage was valid or that the wife had the same status as a wife for purposes of intestate personal property distribution.[6/] In the Ruling, the Secretary recognized that under state statutory law the marriage was void and the wife "could not share in [the husband's] intestate personal property as a wife," SSR 67-56 at 68. The Secretary declared, however, that the Loving decision "must be applied" and held that the woman had the status of wife under the Act, entitling her to wife's insurance benefits.

6/ In operative terms, adjudication of a "wife's" status under the Act is very similar to the method of determining who is a "child" under the Act. Compare 42 U.S.C. §416(h)(1)(A) with §416(h)(2)(A).

The instant case is conceptually indistinguishable. The children before the Court could not share in their deceased father's intestate property because the intestate succession statutes of West Virginia and Mississippi denied inheritance to most illegitimate children. These statutes, however, are plainly unconstitutional under Trimble v. Gordon, 430 U.S. 762 (1977). See Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981). If Loving "must be applied" to determine family status under an unconstitutional state statute, so must Trimble.

In 1980, the Social Security Administration followed a similar approach in SSR 80-13 (1980). Prior to 1970, Maryland's intestate succession statute permitted an illegitimate child to inherit his deceased father's personal

property only if the father had acknowledged paternity and subsequently married the child's mother. In a Social Security child's case, a federal court, in reliance on Trimble, found the Maryland statute unconstitutional. Allen v. Califano, 456 F.Supp. 168 (D.Md. 1978). The Allen court went on to hold that illegitimate children would thus be entitled to inherit under the law which Maryland's courts would apply, including the Constitution. This ability to inherit in turn entitled the children to child's insurance benefits under §216(h)(2)(A).

The Secretary did not appeal Allen but instead issued SSR 80-13 (1980), which extended Allen to all similar claims and provided that "any illegitimate child determined by the Secretary to be the biological child of a male

wage earner who died in Maryland prior to January 1, 1970" will be found eligible for Social Security benefits. Thus, in adjudicating claims filed by illegitimate children whose father died domiciled in Maryland, the Secretary applies the Constitution.

The Loving Ruling and the Allen Ruling are not aberrations. Rather, they are a consistent part of the Secretary's longstanding practice of applying the whole law of the various states in determining Social Security claims.

For example, in SSR 73-11 (1973), a question arose as to whether an illegitimate child born and domiciled in Puerto Rico was entitled to child's insurance benefits under §216(h)(2)(A). The father had died domiciled in New Jersey, which allowed illegitimates to inherit from their father's estate only

when the parents subsequently intermarried, which had not occurred. However, the Social Security Administration looked to the whole law of New Jersey and found that, under cases applying conflicts of law principles, the New Jersey courts would look to foreign law to determine legitimacy. Under Puerto Rican law, the father's acknowledgment of paternity would effectively legitimate the child. As a result, the Social Security Administration concluded that the courts of New Jersey would, if asked, recognize the acknowledgment in Puerto Rico as sufficient to legitimate the child, for New Jersey inheritance purposes, and the child was therefore held entitled to benefits.

In a similar case, an illegitimate child in Arizona applied for child's insurance benefits on his father's earn-

ings record. The father had died intestate and domiciled in Colorado. In SSR 68-73 (1968), the Social Security Administration analyzed whether Colorado courts would find the applicant to be a "child" for purposes of intestate succession. The Ruling first explained Arizona statutory law, concluding that the child would be considered legitimate in that state. The ruling then reviewed Colorado's statutes, public policy, and state court decisions, as well as general conflicts of law principles, and found that the Colorado courts would recognize the child's status as a legitimate in Arizona. This, of course, meant the child was entitled to benefits under §216(h)(2)(A).

Other Social Security Rulings have repeatedly applied the whole law of a state in determining family status for

the purpose of adjudicating entitlement to various types of Social Security benefits. See, e.g., SSR 72-60 (1972) (Child's status determined by analyzing whether Tennessee courts, applying statutes, case law, and public policy, would recognize defective North Carolina adoption); SSR 72-11 (1972) (Child determined to be legitimate by evaluating how Kansas courts, applying statutes, case law, and 'full faith and credit' clause of U.S. Constitution, would treat Missouri divorce); SSR 72-3 (1972) (Widow's claim adjudicated by analyzing how New York would treat Alabama divorce in light of statutes, case law, and 'full faith and credit' clause); SSR 71-44 (1971) (Mother's benefit claim reviewed by analysis of whether New York courts, applying New York case law and Cuban statutes, would

recognize Cuban proxy marriage); SSR 69-21a (1969) (General conflicts of law principles, case law and statutes demonstrate that District of Columbia courts would look to Mexican laws to determine child's legitimacy); SSR 67-25 (1967) (Widow's status determined by evaluating whether North Carolina courts, applying Virginia and North Carolina case law, statutes, and public policy, would recognize voidable Virginia marriage); and SSR 61-65 (Wife's status determined by review of Florida case law and doctrine of laches).

There is no doubt, then, that the Secretary's longstanding practice is to determine family status, and entitlement to Social Security benefits, by a thorough review of much more than simply a state's legislative enactments. The Secretary has consistently interpreted

the Social Security Act to require consideration of state statutes, case law, conflict of laws principles, common law, foreign law and, of course, federal constitutional law.

The Secretary has for many years issued policy statements reflecting his agency's considerable experience in interpreting the Act and its regulations in determining family status. Those interpretations are consistent with the plain words of the Act itself and deserve great weight in guiding this Court. Youakim v. Miller, 425 U.S. 231 (1976). Under these Rulings, the Secretary and the federal courts are required to apply the whole law of the state which, of course, includes the United States Constitution.

(b) Judicial Practice

The Secretary's interpretation of the Act is reinforced by consistent, longstanding judicial interpretation of the Act. The federal courts have, for more than 30 years, consistently interpreted the Act as requiring the application of the whole law of the several states. This interpretation, which supports and complements the administrative practice, is entitled to considerable weight in interpreting the statute. See Fribourg Navigation Company v. C.I.R., 383 U.S. 272, 279-80 (1966).

Over the past few years, in the wake of Trimble v. Gordon, 430 U.S. 762 (1977), the federal courts have applied the Constitution in determining who was the wage earner's "child" under §216(h)(2)(A). See Cox v. Schweiker,

684 F.2d 310 (5th Cir. 1982); Gross v. Harris, 664 F.2d 667 (8th Cir. 1981); Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981); Robin C. v. Schweiker, 532 F.Supp. 677 (D.N.H. 1982); White v. Harris, 504 F.Supp. 153 (C.D.Ill. 1980); Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980); and Allen v. Califano, 456 F.Supp. 168 (D.Md. 1978).

The principle underlying these decisions, however, predates Trimble. In determining family status under the Act, the federal courts have consistently applied all the substantive law that a state court would apply. Applying the Constitution is simply a logical, inevitable extension of this general principle.

One of the earliest reported cases to apply the whole law of a state in determining family status and entitle-

ment to Social Security child's insurance benefits is Atwater v. Ewing, 86 F.Supp. 47 (E.D. N.Y. 1949). In Atwater, the plaintiff children were born of a defective marriage, in that one of the parents had divorced a prior spouse through a Mexican mail-order divorce, which was void under New York law. Id. at 48. The court recognized its duty to determine the children's legitimacy and ability to inherit their father's intestate property in New York by deciding the issue as New York's courts would. Id. at 49. In determining the children's status, the court reviewed not only New York state statutes but also New York case law in various contexts and predicted that the children would be deemed legitimate by the New York courts. Id. at 49-50.

Since the 1940's, the federal courts have continued to apply the whole law of a state in literally scores of Social Security cases in which family status was at issue. For example, in Warrenberger v. Folsom, 239 F.2d 846 (3d Cir. 1956), the court scrutinized Pennsylvania's common law, statutes, and decisional law concerning intestate succession to determine the status of a widow and her child under these laws and, in turn, their status as Social Security beneficiaries.

In Cain v. Secretary of Health, Education and Welfare, 377 F.2d 55 (4th Cir. 1967), the court was faced with determining whether the plaintiff was the "widow" of the deceased wage earner who had died domiciled in Florida. The plaintiff had married the wage earner in South Carolina and had later obtained a

divorce from him in a South Carolina court. Subsequent to the wage earner's death and the denial of Social Security benefits, the plaintiff obtained a state court order voiding the divorce decree.

The Fourth Circuit noted that Florida would look to South Carolina law to determine the validity of the divorce decree and the subsequent voiding order in question. Cain at 57. In finding the voiding order invalid, the Fourth Circuit recognized the Secretary's obligation under §416(h) to determine how the South Carolina Supreme Court, or a nisi prius court of that state, would view the divorce decree and voiding order. Id. at 58. How a state court would decide the issue, if asked, was thus viewed as determinative.

Similarly, the court in Cairns v. Richardson, 457 F.2d 1145 (10th Cir.

1972), analyzed Kansas statutes, common law, and case law to determine the plaintiff's status as a widow. The court reviewed that law by putting itself in the place of the Supreme Court of Kansas. Cairns at 1149.

In Blair on Behalf of Brown v. Califano, 650 F.2d 840 (6th Cir. 1981), the court ordered an award of child's insurance benefits after a careful study of Michigan's common law doctrine of equitable adoption and case law construing that doctrine.

Clearly, then, the consistent practice of the federal courts has been to sit essentially as a state court and analyze Social Security claims in light of a state's statutes, common law, case law, general conflicts of law principles, and whatever other substantive law a state court would apply. As is evi-

dent from the preceding discussion, this method of adjudicating Social Security claims has been consistently applied in literally dozens of cases over many years. See also, McKenzie v. Harris, 679 F.2d 8 (3d Cir. 1982) (Child's legitimacy determined by an analysis of Pennsylvania common law and case law regarding presumption of legitimacy of child born during marriage); Williams v. Richardson, 523 F.2d 999 (2d Cir. 1975) (Child's status determined by applying West Virginia statutory and case law regarding equitable adoption); Kasey v. Richardson, 462 F.2d 757 (4th Cir. 1972) (Child's status depended on Virginia common law and statutory law concerning legitimacy where the child was born of a bigamous common law marriage); Wolf v. Gardner, 386 F.2d 295 (6th Cir. 1967) (Child's benefits case decided pursuant

to an analysis of Ohio common law, case law, and statutes); Kilby v. Folsom, 238 F.2d 699 (3d Cir. 1956) (Child's benefits due under Pennsylvania case law, common law, and contract law principles); Montgomery v. Schweiker, 523 F.Supp. 1128 (D. Md. 1981) (General conflicts of law principles and analogous South Carolina case law demonstrate that South Carolina courts would, if asked, look to Maryland intestacy law to determine whether child was legitimate); Ayuso-Morales v. Secretary of Health and Human Services, 677 F.2d 146 (1st Cir. 1982) (Widow's claim adjudicated by examining common law, case law, and Puerto Rican statutes concerning concubine's status); Chlystek v. Califano, 599 F.2d 1270 (3d Cir. 1979) (Widow's benefits awarded under Pennsylvania statutes, case law, and public policy

interests); and McKnight v. Schweiker, 516 F.Supp. 1102 (D. Md. 1981) (Widow's benefits awarded where presumption of validity of second marriage upheld under analysis of Maryland common law and case law).

Considering the longstanding judicial practice of essentially sitting as a state court and applying whatever law a state court would apply, it is not at all surprising that, when the issue arose, the federal courts did not hesitate to apply the United States Constitution as well. For example, in Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982), the court evaluated a claim under §216(h)(2)(A) by looking closely at the complete Georgia statutory scheme of inheritance, its history, case law interpreting it, as well as the Georgia Constitution and the United States

Constitution. Id. at 322-3. The court ultimately found that the Georgia statute was unconstitutional under Trimble and awarded the children child's benefits. Thus the court applied all the law that a state court would apply.

As mentioned above, Cox does not stand alone, and the same result, in the same circumstances, has been reached in virtually every reported federal court decision with the exception of Jones. See Gross v. Harris, 664 F.2d 667 (8th Cir. 1981); Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981); Robin C. v. Schweiker, 532 F.Supp. 677 (D. N.H. 1982); White v. Harris, 504 F.Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980); and Allen v. Califano, 456 F.Supp. 168 (D. Md. 1978). Each of these cases held that the Social Security Act required an

analysis of the Constitution in evaluating intestate succession rights in regard to claims for child's insurance benefits.7/

Over 30 years of consistent judicial practice demonstrates that the whole law of a state is applicable in these circumstances. The Constitution is conceptually no different than other forms of non-statutory law and, if anything, stands on a higher footing. It is the one form of law which takes

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7/ The Seventh Circuit in Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975), reached a similar result in a different context. In Eskra, then Circuit Judge Stevens held that a Wisconsin intestate succession statute unconstitutionally discriminated against illegitimate children. This Wisconsin statute had been incorporated into federal law for the purposes of determining intestate succession of Indian land by the Bureau of the Indian Affairs. The court held that the state statute denied illegitimate children equal protection and was therefore invalid. As a consequence, the illegitimate child was held entitled to

precedence over all others, and there can be no doubt that it is part of the "law" a state court would apply. With one reported exception, the federal courts have recognized as much and have applied the Constitution as part of the law that a state court would apply.

This longstanding judicial practice, in conjunction with the Secretary's own practice over many years, cannot be lightly disregarded. Indeed, it is convincing evidence that the Fourth Circuit's decision in this case is without support and erroneous as a matter of law.

(n. 7 cont'd)

inherit equally with her legitimate sisters. While this decision is not directly on point, its principal holding, that the Constitution is applicable where state intestate succession law has been incorporated into federal law, is the same as that presented in this case.

III. The Legislative History And Purpose Indicates That Congress Intended To Equate The Ability To Inherit With Entitlement To Social Security Benefits.

As explained above, the language of the statute, as well as the longstanding consistent administrative and judicial interpretation, indicates that the Constitution is part of the "law" that "would be applied" by a state court as used in §216(h)(2)(A). In concluding otherwise, the Fourth Circuit rejected the notion that the Secretary should apply whatever law, from whatever source derived, that a state court would apply in determining intestate inheritance. The basis for the Fourth Circuit's conclusion was that §216(h)(2)(A) intended to incorporate only state statutory law because state intestate succession statutes embodied the popular conception

within that jurisdiction as to which children were probably dependent. [Pet. App. A, p. 21a-23a]. If the Constitution were applied, according to the court, it would be contrary to the overall purposes of the Act because it would "pick up involuntary modifications in the West Virginia and the Mississippi legislation, unintended by each of the state legislatures, but compelled by the federal constitution." [Pet. App. A, p. 27a].

The Fourth Circuit's view of §216(h)(2)(A) is not supported by the legislative history and purpose of the Act, which indicates that Congress intended to simply equate the right to inherit, however secured, with entitlement to Social Security benefits.

The section of the Act involved in this case was added to the original Social Security Act in 1939. Act of

Aug. 10, 1939, Pub.L. No. 379, §209(m), 53 Stat. 1387 (1939). The legislative history of this section is admittedly sparse. The evident purpose from the language chosen, however, is to simply equate inheritance status with the right to obtain Social Security benefits. If a child would be recognized as a child under the law a state court would apply in an intestacy case, then the child would receive Social Security benefits.

This interpretation of the basic purpose is supported by the manner in which the section at issue in this case was enacted. The original Act, adopted in 1935, did not provide benefits to a wage earner's children. Instead, the Act provided for a lump sum payment either to the wage earner's estate or, if the amount was below $500.00, to the persons found by the Social Security

Board to be entitled to it under "the law of the State in which the deceased was domiciled." Act of Sept. 14, 1935, Pub.L. No. 271, §204, 48 Stat. 623 (1935). Under the 1935 statute, a brother, distant cousin, or perhaps even a creditor could receive the lump sum.

In 1939, Congress recognized that the purpose of the Social Security Act would be better served by providing benefits directly to the wage earner's children and spouse, rather than to his estate.[8/] As a result, Congress passed the original provision providing child's benefits to a wage earner's children who

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8/ The Committee on Finance stated "Under a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiary rather than to make payments to the estate of a deceased person regardless of whether or not he leaves dependents." S.Rep. No. 734, 76th Cong. 1st Sess., (1939) at 7.

had the status of a child for inheritance purposes "according to such law as would be applied" by the state courts. Act of Aug. 10, 1939, Pub.L.N. 379, §209(m), 53 Stat. 1387 (1939).

The significance of this history is simply that Congress, in 1935 and 1939, was thinking in terms of equating inheritance with entitlement to Social Security benefits. In 1935, this was clear because the lump sum was paid directly to the estate. In 1939, the statute was amended to restrict the payment to the children and spouse of the deceased, but the basic concept of tying Social Security benefits to inheritance remained the same. Thus, it is evident that Congress intended to make Social Security benefits available to all of a wage earner's children who could inherit his property.

This is a logical purpose because inheritance has traditionally been viewed as one of the most important rights. As the Maryland Court of Appeals phrased it: "[N]o right or privilege in the history of the common law, or in statutory law, is accorded greater sanctity than the right of inheritance." Thomas v. Solis, 263 Md. 536, 542, 283 A.2d 777 (1971). Congress apparently felt that if an illegitimate child could inherit, for whatever reason, the same child ought to be entitled to an award of Social Security benefits.

In this case, Marcia and the Jones children would be found, by a state court, to have the same status as a child who is entitled to inherit their father's intestate personal property. This same status is also sufficient to permit them to receive Social Security benefits.

This analysis is not undermined by Mathews v. Lucas, 427 U.S. 495 (1976), which the Fourth Circuit relied on very heavily. In Lucas, the Court held that the overall Social Security scheme did not impermissibly discriminate against illegitimate children and was therefore constitutional. In reaching this conclusion, the Court identified administrative convenience as the broad, general purpose which supported the various classifications selected by Congress. The selection of §216(h)(2)(A) was viewed as a rational classification because Congress could have reasonably thought that a child who could inherit would more likely have been dependent on his parent prior to the parent's death. Lucas, 427 U.S. at 514. Neither this overall purpose nor the asserted justification for §216(h)(2)(A) is of very much assistance in this case.

Lucas involved a constitutional challenge to an Act of Congress. As a result, the standard of review was fundamentally different than that presented here. Acts of Congress carry a strong presumption of constitutionality, see Mathews v. de Castro, 429 U.S. 181 (1976), and the Court in Lucas recognized that Congress possesses wide discretion in creating legislative categories. 427 U.S. at 515-516. Thus, in Lucas, the Court's role was "simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions . . . " Mathews v. Lucas, 427 U.S. at 516. The Court was primarily concerned with the broad basis for the classifications chosen by Congress and whether these classifications were supportive of the legislative goal.

The Court simply had no occasion in Lucas to analyze how Congress intended §216(h)(2)(A) to be applied in a specific situation.

Moreover, the overall congressional goals are not inconsistent with the specific congressional purpose, expressed in §216(h)(2)(A), of equating inheritance rights with entitlement to Social Security benefits. In the usual case, the Secretary and the federal courts could properly rely on the state intestate statute, and the Constitution would not even be an issue. As a result, the overall goal of administrative convenience would generally be achieved by equating inheritance with entitlement to Social Security benefits.

The fact that in isolated cases the Secretary's task is somewhat more difficult because the Constitution must be

considered does not alter the overall congressional scheme. Lucas did not hold that Congress intended the Secretary to choose the most convenient route in all situations. Indeed, Congress recognized that reference to state statutes would not be sufficient in all cases and directed the Secretary to apply not simply state statutes, but "such law as would be applied" by a state court. Lucas did not decide otherwise.

Finally, the references in Lucas and Jones to a child's actual dependency, as a basis for the congressional scheme, do not detract from petitioners' case. While Congress' primary purpose may have been to replace actual support, Congress also chose not to make actual dependency a requirement for eligibility for child's benefits. The choice to use

broad classifications for administrative convenience was also inherently a choice to entitle some children who had not actually been dependent. The fact remains that illegitimate children in 6 of the 7 categories chosen by Congress are relieved of any requirement to establish actual dependency, Lucas, 427 U.S. at 498-499, and it is undoubtedly true that some children are eligible for benefits even though they were not in fact dependent on their father.9/ This is an in-

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9/ This fact should have diminished the Fourth Circuit's concern that consideration of the Constitution would mean that "the need to prove dependency would evaporate" [Pet. App. A, p. 29a]. The "need to prove dependency" never existed for any child who meets one of the "deemed dependent" categories. Moreover, under current intestate statutes, many states permit inheritance on the basis of paternity alone. See n. 11, infra. In these states, dependency, or even probable dependency, is surely not established by meeting the requirements of state statutory law.

evitable, predictable and normal by-product of Congressional line drawing. See Mathews v. Lucas, 427 U.S. at 508-509; cf. Califano v. Boles, 443 U.S. 282 (1979).

Thus a legitimate child who never met his father and was never supported by him is unquestionably eligible for benefits. The same is true of illegitimate children whose father acknowledged the child in writing but never provided any support. A child who has the status of a child who is entitled to inherit stands on no different footing.

IV. The Fourth Circuit's Construction Of The Act Should Be Rejected Since It Leads To Absurd And Unreasonable Results.

Finally, any doubt about the intent of Congress should be resolved against the Fourth Circuit's construction because this construction would lead to

absurd and unreasonable results, which, of course, are to be avoided. See American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S.Ct. 1534, 1538 (1982), and United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-44 (1940).

In the Fourth Circuit's view, §216(h)(2)(A) does not include consideration of the Constitution. Superficially, this may not seem to be an illogical conclusion.

A fundamental difficulty with this analysis, however, is that a number of state courts have invalidated their own intestacy statutes on federal constitutional grounds. See, e.g., Nagle v. Wood, 178 Conn. 180, 423 A.2d 875 (1979); In Re Estate of Burris, 361 So.2d 152 (Fla. 1978); Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135

(1980); and Allen v. Harvey, 568 S.W.2d 829 (Tenn. 1978). In these states and others, Congress surely could not have intended the Secretary and the federal courts to continue to apply the state statutes which the state courts have invalidated on the basis of the federal Constitution. In these circumstances, the invalidated statute would no longer be used even by the state courts in determining intestate succession and certainly would not be part of the law that "would be applied" by the state courts as used in §216(h)(2)(A). Yet, under the Fourth Circuit's decision, the Secretary would still be required to apply the state statute because §216(h)(2)(A) does not envision consideration of the Constitution.

In Marcia Simms's case, the West Virginia courts would no longer apply

West Virginia's intestate succession statute. This is so because the West Virginia Supreme Court of Appeals has declared its intestate statute unconstitutional. Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981).[10/] Under this decision, Marcia Simms has the same status as a child who can inherit intestate property. Yet, unless the Constitution, as applied in Adkins, is to be considered under §216(h)(2)(A), Marcia will be denied Social Security benefits.

The same would have been true of the Arkansas illegitimate children to whom the Eighth Circuit awarded Social Security benefits in Fulton v. Harris,

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10/ The decision in Adkins was issued after this case had been fully briefed and argued in the Fourth Circuit and the court did not have the benefit of Adkins at the time of its decision. As a result, the Court may wish to vacate the decision and remand Marcia Simms's case for reconsideration in light of the West Virginia Supreme Court of Appeals decision. See infra at 83.

658 F.2d 641 (8th Cir. 1981). In Fulton, the illegitimate children were entitled to Social Security benefits because the state intestate statute had been invalidated by the Arkansas Court of Appeals. The Arkansas court had previously found its statute indistinguishable "from the statute involved in Trimble [v. Gordon, 430 U.S. 762 (1977)]." Lucas v. Handcock, 583 S.W.2d 491 (Ark. 1979), cert. denied, 444 U.S. 942 (1979).

In the context of a federal benefit decision, made by a federal officer and reviewed by a federal court, it is hard to see a rational reason to apply a state statute which the state's own highest court had previously invalidated on federal constitutional grounds. Surely Congress could not have intended this absurd result when it directed the

Secretary to apply "such law as would be applied" by the state courts.

In order to avoid this absurd result, the Fourth Circuit's decision could arguably be read to permit application of the Constitution, but only in those states where the law has been declared invalid by the state's highest court. This would, however, run directly counter to the Fourth Circuit's major premise, i.e., that Congress affirmatively intended to exclude consideration of the Constitution. If Congress did not intend to incorporate constitutional law, what possible difference would it make that a state court had had the occasion to declare its own statute unconstitutional?

In addition, applying the Constitution only where the state courts had acted would mean that entitlement to federally created benefits, in an en-

tirely federal forum, would depend solely upon whether another child had brought a probate case in the courts of the state in which the father died domiciled. Marcia Simms's plight demonstrates this point. At the time her claim was denied by the Secretary, the West Virginia statute had not been formally invalidated by the West Virginia Supreme Court of Appeals. Yet, this statute was so plainly unconstitutional that no argument could be made in favor of its validity. The West Virginia Supreme Court of Appeals subsequently recognized this:

> Our Code, 42-1-5, restricts illegitimates' rights to a greater extent than the Illinois statute declared unconstitutional in Trimble, and so certainly the Supreme Court's rule forbids application of our statute.

Adkins v. McEldowney, 280 S.E.2d 231, 232-233 (W.Va. 1981). Marcia's right to

federal Social Security benefits should not have been made dependent on whether a state court has had the opportunity to formally agree with the Supreme Court. Neither common sense nor the Social Security Act requires this course.

Finally, the Fourth Circuit's decision would have the unreasonable result of penalizing illegitimate children in the context of federal Social Security benefits, solely because the states of West Virginia and Mississippi maintained clearly invalid statutes for years after the Trimble decision. Had either legislature promptly passed a constitutionally sufficient statute, both children might already have received Social Security benefits.[11/]

11/ Many states have adopted constitutionally valid statues which require only proof of paternity to permit inheritance. See, e.g., ALASKA STAT., §13.11.045; ARIZ. REV. STAT. ANN. §14-2109; DEL. CODE, Title 12,

The experience in Mississippi demonstrates this point. The Mississippi intestate succession statute which was in effect at the time the Jones children were denied benefits unconstitutionally discriminated against illegitimate children and was therefore invalid. Mississippi, however, recently amended its statute, presumably in response to decisions of this Court. MISS. CODE ANN. §91-1-15. The new constitutionally valid statute permits illegitimate children to inherit on the same basis as

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(n. 11 cont'd)

§508; D.C. CODE ANN., §19-316; FLA. STAT. ANN., Title 41, §732.108; IDAHO CODE, §15-2-109; MASS. GEN. LAWS ANN., Ch. 190, §7 (West); ME. REV. STAT. Tit. 18-A; N.M. STAT. ANN., §45-2-109; NEB. REV. STAT., §30-2309; PA. CONS. STAT. ANN., Title 20, §2107; UTAH CODE ANN., §75-2-109. Some of these statutes require "clear and convincing" evidence while others demand only a preponderance. This is not a material difference in this case since Marcia and the Jones children have already established paternity to the satisfaction of the Secretary.

legitimate children, requiring only that paternity be established by clear and convincing evidence.[12/] Id. Had this Mississippi statute been enacted earlier, the Jones children would already have received the Social Security benefits they now seek. The Jones children should not be penalized for the state's failure to act promptly.

Given these absurd results, the only rational approach would be the same as that outlined in Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456 (1967). Bosch was a federal tax case, but the principle is the same as presented here. In Bosch, the underlying question involved the validity of property transfers under state law.

12/ The Jones children have already established, to the satisfaction of the Secretary, that the deceased wage earner, Odes Watson, was their father. [Pet.App. F, p. 100a].

The Court noted that the case depended on state law and the courts should apply state law as interpreted by the state's highest court. 387 U.S. at 465. The Court went on to note, however, that a prior state court decision was not mandatory:

> If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

387 U.S. at 465.

This is precisely what the federal courts have done in a multitude of Social Security cases where state law was to be applied, see supra at 46-57, and is how federal courts determine state law issues in diversity cases. See e.g., Klaxon Co. v. Stentor Electric

Mfgr. Co., 313 U.S. 487 (1941). There does not appear to be any substantial reason why the Constitution should be treated any differently. Cf. First National Bank of Chicago v. United Air Lines, 342 U.S. 396 (1952), and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

Viewed in this manner, the Act would require the Secretary and the federal courts to sit as a state court and apply the Constitution to the same extent as would a state court. This would allow the Secretary and the federal courts to follow state court decisions where they were available. If a state court has ruled on the constitutionality of its intestate succession statute, the state court's decision would be conclusive evidence of the law the state court "would apply" and the

decision would guide the Secretary and the federal court in adjudicating Social Security claims. Under this approach, Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981), has now supplied conclusive proof that, when asked, the West Virginia courts would declare its statute unconstitutional.

On the other hand, the Secretary would not be bound to apply clearly invalid state statutes simply because the state's highest court has not had the occasion to consider the constitutional question. In West Virginia, the Supreme Court of Appeals, when finally asked, had no difficulty in stating that their statute was "certainly" invalid under Trimble. Id., 280 S.E.2d at 233. Neither the Secretary nor the federal courts should have had any difficulty predicting this result.

Interpreted in this manner, the Act would not put either the Secretary or the federal courts in the absurd position of applying state statutes which everyone agrees do not pass constitutional muster under decisions of the Court.

The Constitution is, of course, the nation's preeminent law. Requiring the federal courts and the Secretary, a federal officer, to exclude consideration of the Constitution in determining entitlement to federal benefits would, on its face, seem absurd. When the consequences of excluding consideration of the Constitution are considered, however, it becomes evident that Congress never could have intended the absurd and unreasonable results which inevitably occur under the Fourth Circuit's decision.

B. THE DECISION OF THE FOURTH CIRCUIT SHOULD BE VACATED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF RECENT DEVELOPMENTS.

As an alternative to reversal, Petitioners respectfully request the Court to vacate the decision of the Fourth Circuit and remand these cases for further consideration.

In the case of the Jones children, this request is based on the fairly recent amendment to the Mississippi intestate succession statute. The Mississippi amendment was not effective until July 1, 1981, after Jones was briefed and argued in the Court of Appeals. Neither the Court of Appeals nor the Secretary ever determined whether this amendment would entitle the Jones children to inherit in Mississippi and thus to receive Social Security

benefits. The general rule is that courts should apply the law that currently exists, Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), and the amendment itself is expressly retroactive. MISS. CODE ANN. §91-1-15(2)(C)(ii). Thus, if the decision of the Fourth Circuit is affirmed, the Jones Petitioners request the Court to remand their cases for a new determination by the Secretary of eligibility for benefits under the new Mississippi intestate statute.

The Simms case may also be appropriately remanded for a new determination in light of Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981). This case was decided after Jones was briefed and argued in the Fourth Circuit. Adkins was not immediately published and neither party below was aware of this

decision.[13/] Adkins was thus not considered by the Fourth Circuit when it rendered its decision in this case.

Adkins declared the West Virginia intestate statute to be unconstitutional under both the West Virginia and the United States Constitutions. As a result, this decision may have an effect on how the Secretary now views Marcia Simms's claim for Social Security benefits. If the Secretary's position is that a state court decision, like Adkins, must be considered in determining whether an illegitimate child is entitled to benefits, then a remand would be most appropriate.

13/ Counsel for petitioners acknowledge that they perhaps should have been aware of this decision earlier. It did not appear in the Annotated Code of West Virginia until well after the Fourth Circuit's decision, 1982, and was not published by the West Publishing Co., in bound form, until December 10, 1981, shortly before the Fourth Circuit's December 31, 1981 decision.

In light of these relatively recent developments, Petitioners respectfully request that, as an alternative to reversal, the decision of the United States Court of Appeals for the Fourth Circuit be vacated and the cases remanded for further proceedings in light of Adkins v. McEldowney, 280 S.E.2d 231 (W.Va. 1981), and the recent amendments to the Mississippi intestate succession statute.

CONCLUSION

The decision of the United States Court of Appeals should be reversed. Alternatively, the decision should be vacated and the cases remanded for reconsideration by the lower courts and the Secretary in light of Adkins v.

McEldowney, 280 S.E.2d 231 (W.Va. 1981), and the 1981 amendment to the Mississippi intestate succession statute.

Respectfully submitted,

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December 16, 1982